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No. 83-297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ARMCO INC.,

Appellant,

v.

DAVID C. HARDESTY, JR.,
State Tax Commissioner of West Virginia,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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November 23, 1983

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Appellant Armco Inc. submits this brief in opposition to Appellee's Motion to Dismiss or Affirm ("Appellee's Motion"). Armco Inc. states pursuant to Rule 28.1 that the Designation of Corporate Relationships filed as Appendix F to Appellant's Jurisdictional Statement is currently accurate.

This appeal comes down to two irreconcilable views of the nexus required to permit a state to tax the gross receipts from sales made outside the taxing jurisdiction. The Appellant's view is that there must be a substantial relationship between the taxing state and the transactions being taxed, a situation not present in the instant case. That was also the view of the lower West Virginia court herein (Jur. St., App. B), and remains the view of the Supreme Courts of Washington and Alaska. *See Chicago Bridge & Iron Co. v. State Dep't of Revenue*, 98 Wash. 2d 814 (1983), presently on appeal before this Court in No. 82-1848; *Alaska v. Sears, Roebuck*, 660 P.2d 1188 (Alaska 1983).

The Supreme Court of Appeals of West Virginia took a far different view in concluding that, since Armco was a unitary business corporation with some local activities in the State, separate inquiry as to the nexus between the State and the sales transactions in question was not required. Appellee's Motion at 15. It concluded that the required nexus could be found by reference to activities conducted by the taxpayer within the taxing state unrelated to the out-of-state sales transactions being taxed.

The parties are in agreement on the two principles involved and their sources. On the one hand, there is the "dissociation test" of insufficient nexus for imposition of a gross receipts tax arising from *Norton Co. v. Dep't of Revenue of Illinois*, 340 U.S. 534 (1951), *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), *American Oil Co. v. Neill*, 380 U.S. 451 (1965) and *Standard Pressed Steel Co. v. Washington Dep't of Revenue*, 419 U.S. 560 (1975). And on the other hand, there is the "unitary business principle" approved in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980) and *Container Corp. of America v. Franchise Tax Board*, 103 S. Ct. 2933 (1983). The question presented here is simply whether the dissociation test continues to govern in determining the validity of gross receipts taxes imposed on interstate trans-

actions, or whether it has been superseded by the unitary business principle generally applicable to net income taxes.

The plain fact of the matter is that there is no direct judicial support in the decisions of this Court for the application of the unitary business principle in the area of gross receipts taxes. In striving to bridge this gap between the transactional nexus required by the dissociation test and the overall corporate nexus sufficient for the unitary business test, Appellee's Motion repeatedly suggests that the concededly local aspects of other unrelated Armco activities in West Virginia impart a local character to the entire corporation and somehow taint the out-of-state sales at issue here sufficiently to warrant taxation of the gross receipts from those sales. This elevates the unitary business principle to new heights. If the *Norton* dissociation test is now to be discarded, its replacement by extension of the unitary business principle ought to be expressly made by this Court and not left to inference or conjecture.

With respect to the discrimination issue herein, Appellee's Motion does not deny that a heavier tax burden would be imposed on transactions in interstate commerce involving two or more states with statutes identical to the West Virginia business and occupation tax. This is the type of unfairness described as violative of the Commerce Clause in *Container Corp. of America v. Franchise Tax Board, supra*, at 2942.

Finally, the Appellee's Motion states twice that the judgment below "rests on an adequate nonfederal basis." Appellee's Motion at 2, 42. Appellant respectfully submits that there is no basis for that assertion.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss or Affirm should be denied and this Court should note probable jurisdiction and grant plenary consideration of this appeal.

Dated: November 23, 1983

Respectfully Submitted,

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